No. 77-996

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEWIS W. POE, PETITIONER

v.

JOHN C. STETSON, SECRETARY OF THE AIR FORCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORAKI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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1. Petitioner, a former Air Force Captain, was discharged from active service because of mental illness (Pet. App. A1). He filed this suit in the United States District Court for the District of Hawaii, seeking declaratory and injunctive relief, reinstatement, and back pay. He alleged that his involuntary confinement for psychiatric evaluation and subsequent discharge involved, *inter alia,* illegal arrest, false imprisonment, falsification of records, and deprivation of his civil rights. The district court dismissed the complaint, ruling that the court lacked jurisdiction over the defendants, that petitioner had failed to exhaust his administrative remedies, and that petitioner failed to state a claim on which relief could be granted.

The court of appeals affirmed (Pet. App. A1-A3). Stating that "[f]ederal court review of internal military affairs generally is restricted absent '(a) an allegation of the deprivation of a constitutional right . . . and (b) exhaustion of available intraservice corrective measures' " (Pet. App. A2), the court found that petitioner had not satisfied the second requirement. Because "[n]o showing ha[d] been made that requiring such a step would be futile," the court concluded that consideration of petitioner's claims before exhaustion of his administrative remedies would be premature (*ibid.*).

2. The decision of the court of appeals is correct and does not present an issue meriting review by this Court.

Alleging that the Air Force violated its own regulations and his constitutional right to due process of law by hospitalizing him without his consent (Pet. 11), petitioner contends that he need not seek administrative review of his complaints because such action would be futile. As the court of appeals observed (Pet. App. A2), however, petitioner made no concrete showing that relief through administrative channels is unavailable. Whether or not the Air Force Board for the Correction of Military Records (AFBCMR) can "adjudicate the constitutional issues involved" (Pet. 12), the AFBCMR has full power to correct any records that erroneously indicate mental illness and to order petitioner's reinstatement with full restoration of rights.[1] 10 U.S.C. 1552. Should the AFBCMR grant such relief, judicial consideration of petitioner's constitutional claims would be unnecessary.[2]

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[1]Petitioner seeks no damages other than accrued back pay.

[2]Although 10 U.S.C. 1552(b) requires that an applicant file any request for correction "within three years after he discovers the error or injustice," it provides that an untimely filing may be excused if the Board "finds it to be in the interest of justice." Thus, the Board's power to review the alleged injustices against petitioner is not limited to events occurring within the three-year period.

This Court traditionally has been reluctant to interfere in military affairs, especially when the military has not been given an opportunity to consider and correct alleged errors. *Schlesinger* v. *Councilman*, 420 U.S. 738, 754-760. Cf. *McGee* v. *United States*, 402 U.S. 497; *McKart* v. *United States*, 395 U.S. 185, 194-195. Similarly, the federal courts often defer determination of constitutional questions if an administrative decision might make such review unnecessary. *Beard* v. *Stahr*, 370 U.S. 41; *Horn* v. *Schlesinger*, 514 F. 2d 549, 553-554 (C.A. 8). As the Eighth Circuit explained in *Horn*, *supra*, 514 F. 2d at 553:

> We do not share the plaintiff's pessimism [that exhaustion of administrative remedies will be futile]. We will indulge, until otherwise convicted, in the presumption that the military will be astute to afford to the plaintiff all of the rights and the protections afforded him by the Constitution, the statutes, and its own regulations. It will not be forgotten, of course, that the Board's action is subject to judicial reversal if it is arbitrary, capricious, unsupported by substantial evidence or erroneous in law. [Footnotes omitted.]

Petitioner has not alleged any special interest in, or need for, premature judicial review that would justify disregard of the military's right to correct its own errors. See *Sanders* v. *McCrady*, 537 F. 2d 1199 (C.A. 4); *Mindes* v. *Seaman*, 453 F. 2d 197 (C.A. 5). Thus, as the court of appeals concluded (Pet. App. A2), judicial consideration of his claim at this time would be premature.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

DOJ-1978-03